

Rule R9xx-1. Tollway Development Agreements.

As in effect on _____.

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R9xx-1. Purpose.

(1) This rule is created for the planning, acquisition, design, financing, management, development, construction, reconstruction, replacement, improvement, maintenance, preservation, repair, enforcement, and operation of transportation projects utilizing public-private partnerships for tollway development agreements.

(2) The Department's objective in using public-private partnerships is to expand its ability to use innovative, non-traditional procurement, planning, funding, contracting, financing, delivery, and service methods to deliver transportation infrastructure in order to better meet the transportation needs of the state by utilizing resources more readily available in the private sector.

R9xx-2. Authority.

(1) The provisions of this rule are authorized by the following grants of rulemaking authority and provisions of Utah Codes: Title 63, Chapter 46a; Title 63, Chapter 56; Title 72, Chapter 2, Section 120; Title 72, Chapter 6, Section 118; and the Public-Private Partnerships for Tollways Act, Utah Code Sections 72-6-201 et seq.

(2) When the Executive Director or designee determines it appropriate and upon approval by the Commission, the Department may enter into public-private partnership and tollway development agreements.

R9xx-3. Definitions.

Except as otherwise stated in this rule, terms used in this rule are defined in the applicable Statutes. The following additional terms are defined for this rule.

(1) "Commission" means the Utah Transportation Commission, which is created in Utah Code Ann. Section 72-1-301.

(2) "Department" means the Utah Department of Transportation, which is created in Utah Code Ann. Section 72-1-101.

(3) "Executive Director" means the executive director of the Department.

(4) "Proposer" means private entities that submit letters of interest, qualifications, or proposals under these rules for the purposes of entering into a tollway development agreement with the Department, and may include a person or persons, firms, partnerships or companies or any combination or consortium thereof

(5) "Public-private partnership" means an agreement, including but not limited to tollway development agreements, between the Department and one or more public or private entities where there is private sector involvement in the delivery of transportation projects, including but not limited to, private sector involvement in any or all of the following project phases: predevelopment activities, design, construction, reconstruction, financing, acquisition, maintenance or operations. Public private partnership agreements may include reallocations of the traditional risk assignments between the parties to the agreement.

(6) "State" means the State of Utah

R9xx-4. Public Notice

(1) Public notice regarding solicitations issued under this rule shall be posted on the Department's website and may also be published as described in Subsection (2). Notice of a solicitation shall indicate where, when, and how to obtain the solicitation documents, when responses are due and will generally describe the project scope or service desired, and may contain other information such as the desired schedule or financial model. Where appropriate, the Department may require payment of a fee or a deposit for the supplying of the solicitation package.

(2) The notice may be published in any or all of the following in addition to the Department website:

(a) in a newspaper of general circulation;

(b) in a newspaper of local circulation in the region(s) where all or a portion of the intended project will be located; and/or

(c) in industry media.

(3) A copy of the solicitation documents shall be made available for public inspection at the Department Region Office(s) located in the region(s) where all or a portion of the intended project may be located.

R9xx-5. Unsolicited Proposals.

(1) The Department may accept delivery of unsolicited tollway development agreement proposals. An unsolicited proposal shall, at a minimum, provide the information required for tollway development agreement proposals set forth in Utah Code Section 72-6-204. The Department may determine that additional information or other requirements be provided in an unsolicited proposal. Any such additional requirements will be posted on the Department's website.

(a) Any proposer submitting an Unsolicited Proposal must provide a minimum of 20 copies or the proposal will not be reviewed.

(b) The unsolicited proposal must state the period during which the proposal will remain valid, which shall be not less than 12 months following delivery.

(2) The Department may appoint an individual or a screening committee, as it deems appropriate, to screen and evaluate unsolicited proposals to determine whether to request competing proposals and qualifications or reject the unsolicited proposal. The review shall be in two stages:

(a) The initial screening shall be a summary review to determine whether the unsolicited proposal generally meets the minimum statutory and regulatory requirements and merits further review. Proposals that do not generally meet the minimum requirements established under statute and these rules or that the Department otherwise determines do not merit further review may be summarily rejected.

(b) The second stage of review shall be a more thorough review and evaluation of the unsolicited proposal for the purpose of allowing the Department to determine whether to issue a request for competing proposals and qualifications.

(3) The Department will consider an unsolicited proposal only if the proposed project is not substantially duplicative of transportation system projects that have been fully funded by the State, the Department, or any other public entity as of the date the proposal is submitted.

(4) The Department shall give priority to unsolicited proposals that address projects identified on the Statewide Transportation Improvement Program or Long-Range Plan and encourages submittal of proposals that would materially advance or accelerate their implementation.

(5) The Department may, in its sole discretion, reject any unsolicited proposal. If the Department elects to issue a request for competing proposals and qualifications, it may modify the project described in the unsolicited proposal. If the Department issues a request for competing proposals, the proposer that submitted the unsolicited proposal will be offered the opportunity to participate in the competition.

(6) The process for soliciting competing proposals and qualifications shall meet all requirements of Utah Code Section 63-56-502.5. The Department may issue a request for qualifications to prequalify potential proposers interested in responding to the solicitation separate from the request for competing proposals, or it may issue a solicitation package that combines the request for proposals and qualifications. The solicitation package shall include the information required under Utah Code Sections 72-6-205(3)(b) and any other information deemed advisable by the Department. The solicitation may request competing proposals, either at a conceptual or detailed level, or it may request proposals for alternative concepts, in which case the Department would review the concepts and determine whether to reject the proposals or proceed with a new request for competing proposals. All respondents to a competing proposal solicitation, whether conceptual or detailed, must address the technical and financial portions of the proposed project.

(7) If the Department elects to issue a request for competing proposals, the Department shall provide public notice of the proposed project according to Section R9xx-4. Any entity that intends to submit a competing proposal shall provide a written letter of intent to the Department not later than forty-five (45) calendar days after the Department's publication of notice for competing proposals. Any letters of intent received by the Department after the expiration of the 60-day period shall not be valid and any competing proposal issued by an entity that did not comply with these letter of intent requirements shall not be considered. An entity that submits a letter of intent must submit its competing proposal in the manner specified in the request for competing proposals.

(8) If the Department elects not to issue a request for competing proposals in response to an unsolicited proposal, or if the Department issues a request for competing proposals that makes significant modifications to the concepts in the original unsolicited proposal, the Department will notify the proposer that submitted the unsolicited proposal of the rejection or modification and reasons for the rejection or modification. The Department may also post information on the Department website regarding the reasons for rejection or modification.

(9) The Department will assess a screening fee for every unsolicited proposal received and an evaluation fee for every unsolicited proposal that is evaluated. The fees have been set with the intent of substantially covering the costs to the Department for review of the proposal. The unsolicited proposal shall be accompanied by a separate check for each fee, which must be a cashier's, certified, or official check drawn by a federally insured financial institution, as follows:

(a) A check in the amount of \$10,000 for the initial screening; and

(b) A check for the evaluation fee equal to the lesser of (i) the sum of \$20,000 plus .01% of the total estimated cost of design and construction of the project or (ii) \$200,000. This check will be returned to the proposer if the proposal is rejected after the initial screening and prior to the more thorough evaluation.

(10) The Department may waive the fee for an unsolicited proposal, in whole or in part, if it determines that its costs have been substantially covered by a portion of the fee or if it is otherwise determined to be reasonable and in the best interests of the State.

(11) If the Department decides to solicit competing proposals, the Department may require each proposer that submits a competing proposal to submit a fee. The amount of the fee will be identified in the solicitation

documents and will not exceed the amount of the evaluation fee for the original unsolicited proposal. The proposer that submitted the original unsolicited proposal will be exempt from this fee.

R9xx-6. Predevelopment Agreements

(1) A Predevelopment Agreement may be used on a tollway development project. The first phase may include, but is not limited to, planning, traffic and revenue analysis, feasibility studies, design, value engineering, cost estimating, conceptual estimating, financial evaluation and comparisons, constructability reviews, scheduling, or other services as specified by the Department.

(2) The subsequent phase or phases may be for all or a portion of the remaining services contemplated in the proposed project and may include, but not be limited to, design services, construction services, operation or maintenance services, traffic and revenue estimates, financing and toll or user fee collection services. Each subsequent phase will commence after the preceding phase has been completed.

(3) Award of the first phase shall be based on the Department's evaluation of proposer qualifications and may also be based on other factors, including, but not limited to, the Department's evaluation of proposals.

(4) The entity awarded the first phase may have the first opportunity to submit a proposal for the subsequent phase or phases, as set forth in the Predevelopment Agreement. The entity awarded the first phase shall provide all supporting documentation used to determine the scope, schedule, and cost in its proposal for each subsequent phase to the Department for review, along with any other information and requirements set forth in the Predevelopment Agreement. The Department may accept or reject the proposal. If the Department rejects the proposal, the Department may provide a counteroffer and/or negotiate with the entity awarded the first or prior phase, or in lieu of providing a counteroffer or if the negotiations are unsuccessful, choose to solicit competitive proposals for the subsequent phase or phases.

R9xx-7. Request for Qualifications (RFQ)

(1) The Department may issue a Request for Qualifications (RFQ) in order to solicit qualification statements from entities wishing to submit proposals for a tollway development agreement project. The RFQ may be required to be submitted prior to or with a conceptual proposal or a detailed proposal.

(2) Any RFQ shall require that potential proposers provide the information described in Utah Code Section 63-56-502.5(3)(c); and any other information the Department, in its sole discretion, requires as stated in the RFQ.

(3) The field of competing respondents shall be narrowed by the selection committee to the most qualified, not to exceed the maximum number designated in the RFQ.

(4) If only one entity responds to the RFQ or if only one respondent meets the minimum qualification requirements in the RFQ, the Department may negotiate with that single respondent in accordance with section R9xx-10(2).

(5) Engineering and consultant firms who participated in preparation of specifications or other solicitation documents used by the Department for the procurement of a portion, but not all, of the project may participate as proposers or as a member of the proposing entities, upon approval of the Department.

R9xx-8. Request for Proposals (RFP)

(1) If the procurement process includes pre-qualification, the Department will issue the RFP to all prequalified proposers. If the procurement process does not include pre-qualification, the Department will issue the RFP in accordance with Section R9xx-4. The Department may elect to request draft proposals, or proposals followed by discussions, which may include best and final offers, or may elect to award the contract without discussions or best and final offers.

(2) The Department may issue draft RFPs to proposers for comments in order to better manage the procurement process.

(3) The RFP shall identify information required to be submitted by proposers, which shall in all events include the information required for tollway development agreement proposals in Utah Code Section 72-6-204. The Department may require proposers to provide separate technical and price proposals and other elements in their proposals. The RFP may include a request for alternative proposals or for any other information the Department, in its sole discretion, deems appropriate.

(4) The Department may require a proposer to submit additional information following the submission of a proposal, to the extent that the Department deems it necessary or advisable to review such additional

information to evaluate the expertise, experience, financing capacity, integrity, ownership, or any other aspect of any proposer.

(5) The Department reserves the right to require or to permit proposers to submit revisions, clarifications to, or supplements of their previously submitted proposals. The Department may require proposers to add or to delete features, concepts, elements, information or explanations that were not included in their initial proposals. A proposer will not be legally bound to accept a request to add to or delete from a proposal any feature, concept, element or information, but its refusal to do so in response to a request by the Department shall constitute sufficient grounds for the Department to reject the proposal.

(6) If only one entity responds to the RFP or if only one respondent meets the minimum qualification requirements in the RFP, the Department may negotiate with that single respondent in accordance with section R9xx-10(3)

(7) The Department may, at any time and in its sole discretion, reject any or all proposals submitted in response to a request for qualifications or a request for proposals or competing proposals.

(8) Technical solutions/design concepts contained in proposals shall be considered proprietary information unless a stipulated fee is paid.

R9xx-9. Evaluation and Ranking of Proposals; Discussions with Proposers; Revised Proposals

(1) The Department shall conduct proposal evaluations and rank the proposals according to the criteria and relative weightings set forth in the RFP. The Department may adopt either of the following approaches in evaluation of proposals and selection of a proposer for negotiations or award:

(a) A cost-based approach, with the proposals evaluated first to determine whether the proposers meet qualification requirements and have submitted responsive proposals, in which case the qualifying proposal that offers the lowest cost to the state would be ranked the highest. If this approach is used, the RFP shall specify minimum requirements for responsiveness.

(b) A best value approach, whereby the Department evaluates proposals received and determines which proposal is the most advantageous to the State.

(2) The Department may offer the proposers the opportunity to participate in discussions regarding their proposals. Discussions, either oral or in writing and either individually or in a group, may be held with proposers for the purpose of clarification of the proposals and to identify deficiencies in proposals. If discussions are held with one proposer, they must be held with all pre-qualified proposers, unless the discussions are only intended to clarify an ambiguous aspect of a proposal.

(3) If discussions are held, revised proposals will be requested. If revised proposals are requested they will be the basis for selection and will be evaluated as stated in the request for revised proposals, according to a best and final offer process. If a proposer fails to submit a response to a request for revised proposals, its original proposal shall remain in full force and effect.

R9xx-10. Selection Decision

(1) Following completion of proposal evaluations, the Executive Director shall review the results of the evaluations and rankings and determine whether to proceed with negotiations with the highest ranked proposer, recommend award to the highest ranked proposer, or take other action.

(2) If the Department has issued an RFQ, received one or more responses, and determined that only one proposer is pre-qualified, the Executive Director may authorize the Department to enter into negotiations with such proposer directly, without issuing an RFP, or take other action.

(3) If the Department issues a request for competing proposals and receives no response or receives a response only from the proposer that submitted the original unsolicited proposal, the Executive Director may authorize the Department to enter into negotiations with such proposer, may recommend award to such proposer, or take other action.

(4) If a decision is made to proceed with negotiations, a notice of selection for negotiations will be delivered to all proposers and posted on the Department's website. If a decision is made to recommend award, a notice of intent to award will be delivered to all proposers and posted on the Department's website, and the Department shall provide information to the Commission as required by Utah Code Section 72-6-206.

R9xx-11. Negotiations

(1) Negotiations may commence immediately following issuance of the notice of selection. During the negotiation period, the selected proposer shall provide such information as may be reasonably requested by the Department.

(2) If negotiations with the first ranked firm are not successful, the Executive Director may direct the Department to commence negotiations with the second ranked firm. This process will be followed until negotiations are successfully concluded or the Department determines that it will not be able to reach agreement with any of the proposers.

(3) Upon conclusion of negotiations, the Executive Director shall determine whether to recommend award. No determination to recommend award shall be made unless the Executive Director is satisfied that the proposer's cost proposal is reasonable and that the proposal provides sufficient value for money.

(4) The Department may deliver the proposed agreement at any time to the Utah Attorney General's office for review and comment.

(5) If a decision is made to recommend award, a notice of intent to award will be delivered to all proposers and posted on the Department's website, and the Department shall provide information to the Commission as required by Utah Code Section 72-6-206.

R9xx- 12. Award.

(1) There is no requirement that a tollway development agreement be awarded. If the Commission approves award, a contract shall be executed and notice given to the successful proposer to proceed with the work.

(2) The Department reserves the right to cancel the award of any tollway development agreement at any time prior to execution of the agreement by all parties, with no liability against the Department, the Commission, their agents, or the State.

R9xx- 13. Amendments to Tollway Development Agreements.

(1) The Department shall not enter into any substantial modification or amendment to a tollway development agreement without first obtaining Commission approval of the modification or amendment, as specified in Section R941-1.

R9xx-14. Protests

(1) Protests prior to notice of intent to award shall be governed by the Utah Code Sections 63-56-801 and 63-56-803.

(2) Upon notice of intent to award, a proposer who would be adversely affected by the selection announced may, within ten calendar days after the date of such notice, submit to the Department a written protest of the selection of the apparent successful proposer.

(3) For purposes of this rule, a protesting proposer is adversely affected by a selection only if the proposer has submitted a responsive competing proposal and is next-in-line for selection. In other words, the protesting proposer must demonstrate that all higher-ranked proposers are ineligible for selection because either:

(a) The higher-scoring proposals were not responsive to the requirements stated in the Department's solicitation documents; or

(b) The protesting proposer would have been ranked higher than the other proposers but for Department's (i) material failure to follow the procedures set forth in the RFP and other solicitation documents, (ii) material failure to conform to requirements set forth in these rules or in applicable state statutes, or (iii) abuse of discretion in evaluating and ranking the revised proposals.

(4) A proposer's written protest must state facts and arguments that demonstrate how the selection process was flawed or how selection of the apparent successful proposer constituted an abuse of the Department's discretion. If the Department receives no written protest within the ten-day period, then any protesting proposer shall lose any rights or opportunity to advance any claim against the department or state relating to the proposed project.

(5) In response to a proposer's timely filed protest that complies with this rule, the Department will issue a written decision that resolves the issues raised in the protest. In considering a timely protest, the Department may request further information from the protesting proposer and from the apparent successful proposer identified in the Department's notice issued under subsection (2) of this section. The Department will make its written determination available, by mail or by electronic means, to the protesting proposer and to the apparent successful proposer.

(6) The Department shall have the authority, prior to the commencement of an action in court concerning the controversy, to settle and resolve the protest.

R9xx-15. Objection to Contractors

(1) Prior to the execution of any tollway development agreement with a proposer, the proposer must provide the Department with a list of all entities who provide services under the proposed tollway development agreement, including but not limited to, the planning, design, construction, finance, operation or maintenance of the project. All such entities must be legally eligible to perform or work on public contracts under applicable federal and State law and regulations. No entity will be accepted who is ineligible to receive public works contracts in the state of Utah.

(2) If the Department has reasonable objection to any entities who are part of the proposal team or will contribute or otherwise provide services under the proposed tollway development agreement, the Department may require, before the execution of the tollway development agreement, the selected proposer submit an acceptable substitute entity. In such case, the selected proposer must submit an acceptable substitute, and the agreement may, at the Department's discretion, be modified to equitably account for any difference in cost necessitated by the substitution. The Department will set a maximum time period from the date of the written demand for substitution within which to make an acceptable substitution. A proposer's failure to make an acceptable substitution at the end of the time period will constitute sufficient grounds for the Department to refuse to execute the agreement, without incurring any liability for the refusal. Following identification of an acceptable substitute, the proposer shall be granted an additional maximum time period as determined by the Department to conclude negotiations of acceptable terms and conditions with that substitute.

(3) The department may not require any proposer to engage any contractor, subcontractor, supplier, other person or organization against whom the proposer has reasonable objection.

R9xx-16. Rights Related to Proposals; Release of Rights and Indemnification

(1) A proposer, whether unsolicited or solicited, shall not obtain any claim, or have any right or expectation to use any route, corridor, rights of way, public property or public facility by virtue of having submitted a proposal that proposes to use such route, corridor, rights of way, public property or public facility or otherwise involves or affects such. By submitting a proposal, a proposer thereby waives and relinquishes any claim, right, or expectation to occupy, use, profit from, or otherwise exercise any prerogative with respect to any route, corridor, rights of way, public property or public facility identified in the proposal as being necessary for or part of the proposed project.

(2) By submitting such a proposal, a proposer thereby waives and relinquishes any right, claim, copyright, proprietary interest or other right in any proposed location, site, route, corridor, rights of way, alignment, or transportation mode or configuration identified in the proposal as being involved in or related to the proposed project, and proposer shall include in the proposal an indemnity that shall hold the state harmless against any such claim made by any entity that is a member of the proposer's proposal team, including their agents, employees and assigns.

(3) The waiver and release of rights in this section do not apply to a proposer's rights in any documents, designs and other information and records that are otherwise classified as protected records under GRAMA.

R9xx-17. Right to Assert a Moratorium on Unsolicited Proposals

(1) The Department may elect, at any time and in its sole discretion, to establish a moratorium on acceptance or action taken by the Department on any unsolicited proposals.

(2) The moratorium may be asserted for all unsolicited proposals or for unsolicited proposals of a certain type, in a certain region, or for other factors as determined by the Department.

(3) Announcement of a moratorium shall be posted on the Department's website and shall include the start date of the moratorium and either the anticipated ending date, or a date upon which the ending date will be announced.

(4) Any unsolicited proposal received during a moratorium shall not be reviewed nor acted upon by the Department.

R9xx-18. Participation of Public Entities

(1) Notwithstanding the requirements set forth in other sections of this rule, the Department may directly negotiate and enter into a public-private partnership agreement with a public entity without a public solicitation.

(2) In order to ensure that the procurement process for tollway development agreements remains fair and competitive, public entities will not be permitted to submit proposals or to participate as a member of proposer teams with respect to solicitations issued by the Department under this Section R9xx-1. Furthermore, so long as an active solicitation is outstanding for a public-private partnership agreement, the Department shall not separately negotiate with a public entity for the project that is the subject of that solicitation.

KEY

Transportation, highways, contracts, tollway, tolls, public-private partnerships

Date of Enactment or Last Substantive Amendment

[Insert Date]

Notice of Continuation

[Insert Date]

Authorizing, Implemented, or Interpreted Law

63-56-502.5; 72-2-120; 72-6-118; 72-6-201; 72-6-202; 72-6-203; 72-6-204; 72-6-205; 72-6-206